91-187 (3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. _____

ROBERT AND ALICE BEARD,

Petitioners,

v.

SOUTH CAROLINA COASTAL COUNCIL, SIERRA CLUB, CHARLESTON NATURAL HISTORY SOCIETY AND SOUTH CAROLINA WILDLIFE FEDERATION,

Respondents.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA VOLUME 2

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FINAL ADMINISTRATIVE ORDER

Oral arguments in this matter were heard before the full South Carolina Coastal Council on July 15, 1988. Previously an administrative hearing was held before Helen E. Clawson, Hearing Officer on January 13, 1988, pursuant to Section 48-39-140 and Section 1-23-310, et. seq., of the Code of Laws of South Carolina, 1986, as amended, and R.30-6 of the Rules and Regulations promulgated pursuant to the Coastal Management Act. This is an appeal from a staff decision to deny a permit to Robert O. and Alice O. Beard, P/N CC-87-084. The Appellants applied for a permit to construct a seawall approximately 205' in length across four lots on front beach in North Myrtle Beach, South Carolina. By way of a letter dated March 30, 1987, the South Carolina Coastal Council staff, through its Permit Administrator, Steve Moore,

sent the applicant a letter setting forth specific grounds for the denial, it being the opinion of the Permit Administrator that issuance of such a permit would be in violation of the Coastal Management Act, the Coastal Management Program, and the Rules and Regulations promulgated thereunder.

The permit as requested would move an existing bulkhead on the southern two lots 18.5' seaward. On the third and fourth lots a bulkhead would be brought forward approximately 23.9'. As pertains to the fourth and most northern lot, there currently exists no bulkhead. The permit in effect would advance a bulkhead seaward to the property line.

STATEMENT OF CASE

Robert and Alice Beard own Four lots on front beach in North Myrtle Beach, South Carolina. They are located at 5202, 5204,

5206 and 5208 North Ocean Boulevard in the Cherry Grove Section of North Myrtle Beach and are referred to as lots 2, 3, 4, 5, respectively and according to a drawing submitted with a permit application, the lots are uniformly 50' wide and 125' deep. Appellants purchased lot two in 1970, lot three in 1966 or 1967, lot four in 1961 and lot five in 1980. Lots two and three contain a four unit apartment dwelling, lot four has a single-family dwelling and lot five has a two-family dwelling upon it. According to the testimony of Mr. Beard, a bulkhead across lots two and three was built in 1971 and a bulkhead was built across lot four in 1961. It appears that a wall existed at one time on lot five but it has deteriorated to a state that it no longer exists and has not existed for a number of years. Subsequent to the December storm of 1986 and January

storm of 1987, the Appellants applied for a permit, P/N CC-87-084, seeking to construct a bulkhead/seawall approximately 205' in length across the four lots at the property line and in line with the existing seawall on lot one as so designated on the submitted plat. Lot one is owned by the Hartford Motel and is immediately to the south of lot two which is owned by the Appellants.

The permit as applied for would move the existing wall on lots two and three approximately 18.5' forward. On lot four the seawall would be brought forward approximately 23.9' and as to lot five, the permit requests construction of an entirely new wall consistent with the movement forward of the wall on the other lots. The permit if granted would advance the bulkhead seaward to the property line into an area that is characterized as dry

sand beach used by the public. According to the permit application, the work, as proposed and shown on the attached plans consists of constructing the bulkhead/seawall of timber and would be built at an elevation of +8 mean sea level. The Appellants propose that approximately 2,270 cubic yards of fill material would be placed behind the wall. The purpose stated for the project is erosion control.

While the stated purpose of the project is erosion control, the Appellants testified that this purpose was not altogether accurate. Mr. Beard testified that the real purpose of the proposed project was to add protection to all of his property in the belief that he could not sell that portion beyond the existing bulkhead line. In addition to protecting his right to the property up to his

property line, he wanted to provide increased storm protection for the habitable structures located on the landward portion of the lots. Mrs. Beard testified that the primary purpose of the project was to protect the habitable structures all of which sit on piling above the ground. These houses are approximately 30' from the existing wall which crosses three of the lots. Mrs. Beard, together with the expert appearing on the Appellants behalf, also testified that the proposed project would serve the purpose of reducing the buildup of sand on the lots.

According to testimony from the Appellants, a January 1, 1987, storm removed sand in front of the wall to a depth of about three feet from the top and the sand loss was more pronounced in the area adjacent to the Hartford Motel wall.

By March, however, the sand had built back approximately one and one-half feet, reflecting the fact that the beach was recovering from the erosion resulting from this storm. It is clear that this beach is accreting and according to the testimony of Mr. and Mrs. Beard, in their experience the buildup has continued unabated for approximately 25 years. The Appellants have in fact removed sand from behind the existing walls and in front of their walls because a dune was being formed by the natural action of wind and wave. The removal of the excess sand was primarily a result of the concern of the Appellants that their tenants would lose access to the beach or have to walk through or over a dune to get to the beach. Mrs. Beard believes that the buildup of sand threatens the rental rates

because people do not want to walk uphill to get to the beach.

Dr. Billy Edge testified as an expert in the area of beach processes and beachfront management on behalf of the Appellants. He testified that he visited the site twice for the purposes of evaluating the acceptability of a seawall in front of the Beard property. According to Dr. Edge, the area is accreting and the evidence since 1955 is adequate to form a long term projection that the proposed seawall would not have any negative impact on the beach in front of or adjacent to the site. He testified that he did not feel there was any imminent threat to any structure on the site and that the purpose of the wall was to provide protection only during rare storm events and to prevent wind blown sand from continually moving onto the Beard property. He testified,

however, that he did not recall the dimensions of the wall.

Dr. Edge cited the loss of dry sand beach to public use as being the only negative impact of the project. This loss would occur in the area behind the proposed wall. He stated that the public uses such areas and that the cumulative result of similar permits in the North Myrtle Beach area would be significant. He agreed that the beaches of the state have a very major impact on our economy.

Christopher P. Jones testified on behalf of the South Carolina Coastal Council as an expert in coastal engineering, specifically dealing with coastline processes and shorefront management. He testified that the area in question is accreting as a result of the presence of Hog Inlet to the north of the site, this being the cause of most

shoreline dynamics in the immediate area. The inlet benefits the site because the Appellants' property is protected by the shoals of the inlet which generate the accretion. Further down past the Beard property into the Cherry Grove section, the beach erodes at the rate of one to two feet per year. The Beard property is in a transitional area between the beach directly sheltered by the shoals and the erosional beach further south. The site exhibits a long term trend of gradual accretion. He testified that the proposed structure would not adversely affect the dynamics of the beach except possibly during storm conditions. During storm conditions the Beards may experience erosion at the site for short periods of time not unlike what occurred during the winter storm of 1986 and 1987.

Continuing his testimony, Mr. Jones concluded that there is no engineering advantage to the proposed bulkhead/seawalls as proposed and due to the elevation as indicated on the drawings attached to the permit application there would be no more protection for the lots from the proposed wall than the existing walls on the site. These walls are not storm surge devices in the sense that they could withstand major storm events or hurricanes, but are primarily intended to protect against gradual erosion and less significant storms. Furthermore, waves could reach the upland property from the north because no wall exists at lot five or beyond. While there are no significant engineering gains to the Appellants from the project, placing the wall further onto the beach would make it more vulnerable to wave attack.

Mr. Jones visited the site on several occasions and determined that the area in front of these walls is subject to wave action. According to available information, there is average availability of dry sand beach on the order of 50' to 75' in front of the Hartford wall. Beach profiles reviewed showed that the dry sand beach in front of the Hartford wall varied from twenty to one hundred feet during the course of a year. The dry sand beach or the area above the limits of runup or mean high water is smaller in the winter than it is in the summer because of the seasonal effects of storms. However, even during the summer visit in 1987, the runup came within 20 feet of the Hartford wall.

It is clear that the mean high water mark fluctuates and that the public use of the beach is dictated by the limit of wave runup. The public in general uses all

areas of the beach up to the landward most barrier, in this case to the walls located on the Beard property. The public use of dry sand beach shifts during movement of the tide and the project as proposed would affect the availability of 4,300 to 4,400 square feet of recreational beach to the public.

Mr. Jones concluded that it is unwise to move walls forward on the beach as it reduces the area available for public use and as stated above, makes the seawall/bulkhead more vulnerable to storm attack. If the purpose of the permit is erosion control, then the better solution for this beach is nourishment. Since the Council does not have that option available because the City of North Myrtle Beach has not agreed to enter into a renourishment program sponsored by the Army Corps of Engineers, then the only

option left open to the Council is to limit the placement of bulkheads/seawalls on the beach or to remove them as far away from the wave action as possible.

In assuming that the Council follows a policy of allowing people to move seawalls forward, Mr. Jones stated that for every foot that existing structures are moved out onto the beach along the North Myrtle Beach shoreline that approximately 1/3 to 1/2 an acre of dry sand beach would be lost. In terms of how many people use an acre of beach, he testified that in his shorefront management work he estimates that 100 to 200 square feet of beach is necessary for each person to have a visit. The cumulative impact of moving walls out onto the beach in the North Myrtle Beach area would be the loss of available dry sand beach to thousands of people. Since the economy of the Grand Strand is driven

by the existence of a dry sand beach, there is a significant interest in discouraging projects such as the Beards'.

Based upon the fact that the beach is stable, that there is no real engineering benefit to be gained by moving the walls forward on the beach and that public use of the beach would be severely impacted, his recommendation would be not to build the project. If erosion control is a real need, he recommended nourishment as the most appropriate solution.

Mr. Steve Moore, Permit Administrator, testified that the Council allows only two types of projects in the beach critical area, that being walkovers across sand dunes for beach access and erosion control projects. Thus, if the purpose of the project serves reasons which are not related to if the purpose of the project serves reasons which are not related to

erosion control or access, it is not appropriate or sufficient to support the issuance of a permit. The Coastal Council will not allow a person to place a bulkhead or seawall in the beach critical area for the purpose of enhancing the salability of their property or for the purpose of keeping sand off of a lot.

Mr. Moore denied the application because there are existing erosion control structures on the site and there is no erosion problem. In addition, Council regulations require that the upland property be imminently threatened by erosion or that the area be adjacent to existing erosion control structures. All testimony received from the experts recognized that the upland structures are not imminently threatened, and clearly there is no erosion control structure to the north for several lots. In any event,

even if circumstances warrant the issuance of a permit for an erosion control structure which may be adjacent to another such structure, the Council does not automatically allow an individual to move erosion control structures forward on the beach. Such is the case here.

In addition, Mr. Moore consistently applied the requirements [see R.30-13(A)(2)(b)(i)] which states that:

> "All applications for construction of a seawall/bulkhead/revetment in the beach or sand dune critical areas for purposes of filling behind these structures for the creation of land for private or public developments shall be denied by the Council, unless there is no feasible alternative."

Mr. Moore testified that he considered that the backfill, which would be needed behind the proposed wall, would in effect create land and remove from public use the area behind the proposed wall.

Mr. Moore also testified that he was concerned about the cumulative impacts of such a project in that if the Council started issuing permits for people to go out to their property lines, construct a bulkhead and fill those areas behind erosion control structures that it would have a very significant impact on the beachfront of South Carolina. The impact in his opinion would be the loss of recreational dry sand beach for public use. The public uses all of the dry sand beach until a barrier is reached and in this case it is clear that the public uses the area in front of the existing walls for public recreation.

Mr. Moore testified that the area of dry sand beach which would be lost if the proposed project were permitted would be approximately 4,300 to 4,400 square feet. While this area in and of itself may not

be significant, from a cumulative impact point of view, this project if permitted, could result in many similar applications up and down the coast. As a result, Mr. Moore testified that the Council has never permitted, in his recollection, a similar project in the Grand Strand area.

Mr. Moore also concluded that the stated purpose, erosion control, can be met by alternatives other than moving the walls forward to be in line with the wall in front of the Hartford Motel. First, the need for a wall on three of the lots is already met by the existence of the structures present on the lots. Secondly, the Council has a preference for soft solutions on the beaches and in fact, the Beards testified that there is so much sand on the lot that they have to remove it by shovel and wheelbarrow. Thirdly, the Beards have a right to place a wall on

lot five at a point beyond the critical area line.

The Council in denying the project, is placing a significant emphasis upon preservation of the dry sand beach for public use whether or not the dry sand beach is publicly or privately owned. The public has used such areas since time immemorial, and removal of these areas, could impact tourism dependent upon the existence of a dry sand beach. Based upon this fact, the Council has become more strict over the years regarding the issuance of permits of erosion control devices which affect the dry sand beach resource. The Council is concerned about public use and preservation of long range public and private interests which are dependent upon the beach resource. Mr. Moore testified that he has the following concerns. First, the issuance of a

bulkhead/seawall permit generally results in the proliferation of other similar structures. Second, the placement of such walls eliminates sand from the natural system (this sand is locked up behind the walls). Third, the North Myrtle Beach Shorefront Management Plan indicates the ideal dune line in fifty years is very much landward of where it is today. Finally, he was concerned with the long range prospect of sea level rise and the fact that twenty-five years of accretion may not be a permanent and continuing phenomenon at the site.

It is clear that the Council is reluctant to issue permits for erosion control structures, and does so only as a last resort. The Act requires that the Council weigh the public benefit or public harm against the private interest benefit obtained through a permit. The Council

has concluded that the dry sand beaches, as much as possible, should be preserved and maintained for public use inasmuch as long-term private interest in preserving the coastal economy is identical to the long-term public interest of preserving the dry sand beach resource for recreational use.

Donald Bellamy, a South Carolina Wildlife and Marine Resources employee who has lived in the Myrtle Beach area all his life, testified that the public uses the North Myrtle Beach dry and wet sand beach for recreation, and as stated by the other witnesses, this use extends to the first landward barrier. In addition to normal uses, the City of North Myrtle Beach continues to allow the customary use of the beach by vehicular traffic.

In the final analysis, the testimony was replete with statements about the

importance of the dry sand beach in front of Mr. Beard's existing walls, that this area is used by the public, and that the cumulative impact of the loss of such beach is significant to the public interest. On the other hand, testimony from all parties is that the area in front of the Appellant's walls is very gradually accreting, that there are no habitable structures imminently threatened, that the purpose of the project can be met without construction of the proposed bulkhead/seawall, and that no real benefit will flow to the Beards other than reclamation of approximately 4,300 to 4,400 square feet of recreational beach. The only evidence submitted indicates that the Appellants will receive no greater protection from storm or wave action by relocation of the walls beyond their existing location and that there are no

other purposes which would be legally served by such a project.

FINDINGS OF FACT

In addition to the foregoing, the Council finds as follows:

It finds that the Appellant/Permittees own four oceanfront lots in the Cherry Grove section of North Myrtle Beach, Horry County, South Carolina. There are bulkheads on three of the lots, however, on the northern most lot there no longer exists a bulkhead. A permit was applied for to move the existing walls on Lots 2 and 3 approximately 18.5' forward. On Lot 4 the seawall would be brought forward approximately 23.9' and as to Lot 5, the permit would require construction of an entirely new wall.

It finds that the Appellant/Permittee has the following purposes for the project:

1. To move the walls out to the property lines in order to ensure that he could sell that portion.

2. To provide increased erosion control protection for the habitable structures from storm events.

3. To reduce the buildup of sand on the lot in order to provide easier access for the tenants.

It finds that the beach in this area is gradually accreting.

It finds that the average availability of dry sand beach in front of the proposed walls is 50 to 75 feet, however, the dry sand beach in front of the Hartford wall varies from 20 to 100 feet during the course of the year. In addition, water does reach the face of the existing structures on the Beard property during some times of the year.

It finds that the Appellants will not be significantly impacted by having this permit denied for the following reasons:

1. The purposes for which the project is being built can be met by other means except for the desire of the Appellants to reclaim land by bulkheading and backfilling to their property lines.

2. There will be no significant increase in protection to upland structures against storms or wave action as a result of moving the walls forward as envisioned under the permit.

3. If in fact the purpose of the project is erosion control, then leaving the wind driven sand in place affords natural protection which is the best form of beach nourishment.

4. It is clear that the beach has recovered from the 1986-1987 winter storms and will continue to recover rapidly even after other storm events, so that there are no significant engineering problems as a result of having the Hartford Inn wall 18' in front of the wall on Lot 2.

5. There was no evidence presented to clearly demonstrate that the Appellants will be adversely impacted economically by the denial of this permit. While the Appellants stated that they believe that real income may be impacted as a result of the loss of beach access, this access is available without construction of this project.

It finds that the value of the dry sand beaches, including the one in question, is

immeasurable in terms of recreation and support of the tourist industry in the Grand Strand area.

It finds that both the program document and the rules and regulations find substantial value in the dry sand beach. R.30-1(B) sums up the findings concerning the value of this resource most succinctly, as follows:

> Each year millions of South Carolina citizens and visitors enjoy the natural setting of the state's shoreline. Aesthetically the beaches are a unique experience; and recreationally, these areas are increasingly needed for boating, swimming, sunning, and fishing, as leisure time and mobility continue to increase.
>
> Beaches and dunes are nesting grounds for sea turtles and numerous bird species, several which are endangered. The beaches and adjacent coastal waters are also habitat for many marine species.
>
> Probably the most vitally important aspect of the beach and dune system is its contribution to storage of sand and the shoreline stability. This system serves as a barrier

which protects adjacent inland areas, dissipating the energy of storm waves. The dunes are a source of sand to aid in the natural renourishment of the beach from the landward side.

The beach itself is relatively tolerant to normal recreational use such as walking or fishing. It is important however, that enough room be allotted between structures and the shoreline so that if natural erosion occurs, natural deposition can restore the beach without the occurrence of property damage.

These same resources of beaches and dunes are desirable locations for habitation and recreation and are subject to intense development. It should be noted, however, that housing and commercial activity may not be compatible with the rapid changes which occur naturally on some beaches and dune areas due to erosion and the effect of hurricanes. Therefore, regulations to ensure sound development in the critical areas are essential to protecting the resources as well as protecting lives and property."4 [For further findings and policies see IV 51-65, State of South Carolina Coastal Management Program (1979).]

It finds that the Council has balanced the need to preserve public access in and

to the area against the private interests of the Beards for reclamation of the area.

It finds that the staff made adequate factual determinations concerning the detrimental impact of erosion control structures on the beach and upon public use of the area in question. The staff had access to shorefront management documents and other information together with a policy position of the Council which existed at the time that this permit came under consideration. The policy of the Council at this time is one of moving erosion control structures landward or limiting their construction as much as possible.

It finds that the Permit Administrator has not been arbitrary and capricious in that he has followed the policies set forth in the Act, the rules and regulations, and the precedent of the

Council in a logical and fair manner. He has treated the Appellants similarly to other persons so situated.

It finds that the Permit Administrator followed all appropriate provisions of the Coastal Management Act and the Rules and Regulations promulgated thereunder and that the Council generally promotes the natural features of the dune and beach system rather than artificial protection. In addition, this project would interfere with existing public access which cannot be replaced by the appellants.

It finds that this project would significantly violate R.30-13(A)(1)(g) in that there are no permanent improvements on the lots which are imminently threatened by erosion, that the property is not between existing erosion control structures, but is adjacent only to a structure on the south, and that there is

no approved erosion control plan that would allow for the building of such structure.

It finds that the project will have the effect of creating land for private use, because filling behind the bulkhead would be required. This is directly in contravention of R.30-13(A)(1)(b)(i).

It finds that the permit would have a serious cumulative effect on the dry sand beach critical area and seriously threaten the recreational use of such areas and the tourist economy generated by this resource.

It finds that Rule 30-13 requires the Council to consider cumulative impacts.

It finds that the general private interest is the same as the general public interest in that preservation of the dry sand beach means preservation of the coastal economy. Appellants contends that

will be affected, however, it is clear that he will continue to have the use of the recreational dry sand beach.

It finds that Council, even when it does issue a permit for an erosion control structure which exist adjacent to other structures, does not normally move walls forward onto the beach in order to bring them in line with an existing structure.

It finds that the appropriate use for the 4,300 to 4,400 square feet of beach impacted by this project is that of public recreation.

It finds that the Appellants would be required to change the natural character of this property in order to meet their private purposes.

It finds that by regulating the area through the law and rules and regulations that there has been no physical invasion of the property by the state but merely

regulation of the area to prevent a public harm and long term private harm of removing usable recreational dry sand beach.

It finds that the highest and best use of dry sand beach is for public recreation.

It finds that the Appellants have shown no monetary losses as a result of this regulation.

It finds that the public has always had the customary usage of this beach. This use is characterized as follows:

1. The use has generally been exercised to a dune, vegetation line or to the face of a bulkhead. In this case, the public has regularly used the beach in question up to the bulkhead.

2. The recreational use of the Grand Strand area is uninterrupted. In this instance, the local municipality actually regulates certain uses of dry sand beach including vehicular traffic.

3. The use of the Grand Strand beaches and this beach in particular has been free and without dispute.

4. The public recreational use of the beach is reasonable use and one of the most common uses of the beach.

5. This beach is suitable to recreational use and this use is not repugnant to the law and in fact is supported by the Coastal Management Act.

It finds that mean high water mark fluctuates on the beachfront.

It finds that the enjoyment by the public of the beach area below mean high water is inseparable from the public use and enjoyment of the dry sand beach above the high water mark whether publicly or privately owned.

It finds that Section 48-39-20(E) recognizes that there is "decreasing open space for public use and shoreline erosion", and that the Council is charged with the responsibility of preserving the public's interest in the recreational uses of the dry sand beach.

CONCLUSIONS OF LAW

The Council bases its permit decisions upon the provisions of the Coastal Zone Management Act, the policies, rules and regulations promulgated thereunder, the individual merits of each case and other appropriate law.

The Appellant set forth grounds for appeal which can be narrowed to four basic questions set forth below.

I. Does the decision of the permit violate Rule 30-11?

II. Did the decision making process of the Agency fail to include factual determinations on the individual merits of this case, including no determination that it would be detrimental to the beach, so as to violate Section 48-39-150(A)?

III. Does the adverse impact on the Appellant exceed the projected benefits to the public, so as to warrant issuance of the permit?

IV. Does the denial of the permit amount to a "taking" without due process or just compensation in violation of Section 48-39-30(C), Article I, Section of the South Carolina Constitution, and the 5th Amendment of the U.S. Constitution?

The Council in voting to uphold the staff's decision to deny this permit rejects the Appellants position that the facts or law support approval of their project. The Council addresses each question as follows:

I. <u>As to R. 30-11</u>

Rule 30-11 as a whole sets forth General Guidelines for all critical areas

and clearly entails a balancing process between public and private interests in the context of long-range planning. Denial of this permit, however, meets these general guidelines and their purpose of the Council to "reduce the irreversible loss of ... beaches while meeting long-range state development needs." [See R. 30-11(A)]

R. 30-11(B) sets forth the ten general considerations as stated in 48-39-150 of the Act. Clearly B(3), B(4), B(5), B(7), B(8), B(9), and B(10) apply. Each of these considerations place a very high value on preservation of dry sand beaches over and against the right to reclaim such a resource.

R. 30-11(C) expresses the fact that any evaluation of a project which will impact on a critical area must take into account the findings and policies of the Act in

the context of long-range cumulative impacts of a projects. The cumulative effect of moving hard erosion control structures forward onto a dry-sand beach would be devastating to the public use and enjoyment of this resource. Although this project maybe insignificant in relationship to the entire coast, denial of the permit represents a commitment to good management of the state's dry sand recreational beaches.

Rule 30-11(C) cannot be read in a vacuum, but must be viewed in relation to other provisions of the Act and Rules and Regulations. The findings of the Act (48-39-120) recognize the loss of important coastal values due to ill-planned development and emphasizes "the urgent need to protect and give high priority to natural systems while balancing economic interests." The Council fleshed out these

findings in the program document and Rules and Regulation recognizing that preservation of the dry sand beach is of extreme significance. In addition, the Council has determined through these findings and its own case law that the greater public good of preserving this resource is detrimentally impacted by hard erosion control 22 structures in the critical area. (eg. Edge v. SCCC, Court of Common Pleas, Op. No. 86-CP-26-237).

Both the Management Program Document and Rules and Regulations find substantial value in the dry sand beach [see, eg. R.30-1(B)].

In addition, the Council recognizes the impact of hard erosion control structures on the beaches in R.30-13(A)(2)(a):

> These structures can protect features behind them, but they will not protect the beach on their seaward side. If such structures are constructed on an eroding beach,

> the erosion will in most cases continue, and the dry beach area will diminish and eventually disappear. In many cases, seawalls contribute to erosion of the beaches to their front as well as to the property on either emphasis added side.) (Also see IV 51-65, Management Program).

As a result of the obvious adverse impact erosion control structures have on beaches, the Council has followed an increasingly tighter policy of avoiding hard structures on the beach and has encouraged moving them as landward as possible when a structure is permitted. (See Edge v. SCCC) This is supported by the policies of the Act and pertinent rules and regulations. Section 48-39-30 specifically provides that the Council must:

> (B) (1) "Promote economic and social improvement of the citizens of this state and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a

coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;

(B)(2) Protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations;"

In order to implement these policies, the Council has promulgated rules and regulations which clearly provide that the Appellants permit application should be denied. These regulations are as follows:

(1) The Council will promote the use of natural features of the dune and beach system rather than artificial protection. [R.30-13(A)(1)(b)]

(2) Erosion control structures must not interfere with existing or planned public access unless other adequate access cannot be provided. [R.30-13(A)(1)(d)]

(3) All erosion control projects must consist of environmentally accepted materials, demonstrate sound design and construction so that they could reasonably be expected to be safe and effective

and minimize adverse effects on the beach. [R.30-13(A)(1)(f)]

(4) Erosion control structures should not normally be approved except when erosion imminently threatens permanent improvements, including but not limited to buildings, paved parking lots, swimming pools, etc., which existed on the subject property ninety (90) days after the adoption of this regulation (September 27, 1981); or in the case of protecting property adjacent to existing erosion control structures; or, in the case of structures specifically called for in an approved erosion control plan. [R.30-13(A)(1)(g)]

(5) All applications for construction of a seawall/bulkhead/revetment in the beach or sand dune critical areas for purposes of filling behind these structures for the creation of land for private or public development will be denied by the Council. [R.30-13(A)(1)(b)(i)]

Applying the law and rules and regulations to the case at hand we find a permit application which seeks to advance a bulkhead onto the dry sand beach to these property lines for the purpose of erosion control. This is violation of the

law, policy and rules and regulations because:

(1) The permit purpose can be met without issuing a permit. There is an existing erosion control device on the site.

(2) There is no erosion at the site and there are no permanent structure imminently threaten.

(3) While there is an adjacent erosion control device that does not mean that you can automatically move seaward to bring them in line with one another.

(4) The project would have the effect of creating land for private use because filling behind the bulkhead would be required.

(5) Issuance of this permit would have a serious cumulative effect given the general policy against hard structures on beaches and reclamation of critical area for private purposes.

In addition to the findings set forth above concerning the project the following factors are pertinent to the decision to deny.

(1) This denial is consistent with treatment of other similarly situated persons.

(2) The dry sand beach generates a tourist industry which in turn creates 14 millions of dollars in revenue for the state each year. Our court recognized the significance of this tourist industry in Hucks v. Riley, et al., ____ S.C. ____, 357 S.E. 2d 458 (1987). Our court there said:

> The importance of the tourism industry to the economic viability of South Carolina cannot be underestimated. Tourism is the second largest industry in South Carolina. Tourists spent over 2.7 billion dollars in 1984, generating 262.5 million dollars in state, federal and local taxes, including 142 million dollars in state, tax collections. The Myrtle Beach area tourism expenditures amounted to more than 1.4 billion dollars in 1984.

(3) Sea Level is rising and the long range forecast for the coast of S.C. is not accretion but erosion of the shoreline.

(4) The general private interest is the same as the general public interest. Preservation of the dry sand beach means preservation of the coastal economy. The Appellant contends that his personal private interest will be affected, however, it is clear that he will continue to have the use to which his property has been dedicated, that is recreational dry sand beach.

(5) Beyond the Council's charge to meet "the urgent need to protect and give high priority to natural systems" (48-39-20)E), the Oil and Gas Act sets forth in 48-43-520(1) and (2) a declaration of use of the beach resource as follows:

(0) That "the General Assembly finds and declares that the highest and best use of the seacoast of the state is a source of pubic and private recreation. The General Assembly further finds and declares that the preservation of this use is a matter of the highest urgency in priority and that such use can only be served effectively by maintaining the coastal waters, estuaries, tidal flats, beaches and public lands adjoining the seacoast in as close to a pristine condition as possible, taking into account multiple use accommodations necessary to provide the broadest promotion of pubic and private interest.

By way of the foregoing, it is manifest that the decision to deny was not arbitrary and capricious and is consistent with all appropriate law.

II. As to section 48-39-150(A)

Appellant alleges that no "factual determination (was made) that the permit

would be detrimental to the beach ..." and this amounts to violation of Section 48-39-150(A) and the Appellants' right of due process [See D.(1) Appellant's Grounds]. In addition, Appellant alleges that the adverse impact of the decision clearly outweighs any benefit to the public [See D.(2)].

The Appellants proposition that no factual determination has been made as required by due process of law [Section 48-39-150(A)] is without merit. The Coastal Zone Management Act is based upon factual determinations set forth in its findings that support the decision made by the staff to deny this permit. Likewise, the Coastal Program Document and the Rules and Regulations set forth findings. These factual findings are all cited under Question I above.

These findings led to regulation intended to allow no structures on the beach except walkways and erosion control structures. Erosion control structures are allowed in a few circumstances. [See R.30-13 (A)(1)(G).] In addition to the findings of the Act and Rules and Regulations the Council's factual staff made the following determination:

> "There is an intact seawall in place on the site. Construction of an additional wall seaward of the present structure would not only have an adverse effect on the public beach, but would amount to the creation of land for private use. The installation of a vertical seawall could interrupt beach dynamics and possibly hasten erosion in other locations.
>
> The fact that a functional seawall is in place demonstrates that no habitable structure is imminently threatened by erosion. As such, this particular site does not qualify for any additional hard erosion control." (See denial letter of March 30, 1987, page 1.)

It is clear that a factual determination concerning the detrimental impact of erosion control structures on the beach resources has been made here and that the staff complied with 48-39-150(A). The due process argument is without merit in that all safeguards required by Article I, Section 22 of the Constitution, Section 48-39-180, and Section 1-23-310 of the Code have been met.

In addition to the foregoing it is significant to point out that a thorough hearing of all factors was made before the hearing officer. This hearing satisfied all due process concerns.

III. As to the adverse impact on permittee versus public good.

There is no adverse impact on the permittee. Reviewing the purposes stated at the hearing, the Council does not issue

permits intended to improve salability of a lot or to prevent buildup of sand on private property. For these purposes, issuance of a permit would amount to creation of highland solely for private purposes. Further, the record is clear that erosion control protection will not be improved by issuance of the permit.

On the other hand, the proposed project would deny public access to dry sand beach and could lead to substantial cumulative impacts if projects such as this were consistently permitted. As stated above, the Council has deemed that the public good in preserving the public dry sand beaches is significant.

IV. As to "taking" argument.

The Coastal Management Act was passed by the General Assembly as a recognition that "increasing and competing demands

upon the lands and waters of our coastal zone occasion by population growth and economic development.... have resulted in the decline or lost of living marine resources, wildlife, nutrient rich areas, permanent and adverse changes to ecological systems, decrease in open space for public use and shoreline erosion." (Section 48-39-20(B)) It further recognized that "important ecological, cultural natural geological and scenic characteristics... were being irretrievably damaged or lost by ill-planned development," and that there was an "urgent need to protect and give high priority to natural systems in the coastal zone while balancing economic interests." (See 48-39-20(E) and (F) respectively.)

The Coastal Management Act by placing a very high public interest in preserving the natural environment through a

management scheme, inherently created a public/private interest conflict over the limits of the police power of the state in regulating privately held tidelands and wetlands. In order to prevent unduly restrictive regulations, the Act provided that "no governmental agency shall adopt a rule or regulation or issue an order that is so unduly restrictive so as to constitute a taking of property without the payment of just compensation in violation of the constitution of this state or of the United States." (Section 48-39-30(C)). The South Carolina cases and cases relied upon by our Court in determining when police power constitutes a "taking" have thus far set a very high threshold for a successful challenge to the state's power in regulating the environment of the Coast.

The lead case is Carter v. South Carolina Coastal Council, 281 S.C. 202, 314 S.E. 2d 327 (1984).

Robert W. Carter applied for a permit from the South Carolina Coastal Council to raise the elevation of approximately 5.3 acres of marshland adjacent to Scott Creek in Edisto Island in Colleton County. The permit request for fill was denied by the Council. The South Carolina Supreme Court in overturning a determination by the Circuit Court that this was a "taking" held that "the Council's action constituted a legitimate exercise of the state's policy power, rather than an unreasonable "taking of respondents property." Without discussing what "unduly restrictive" means, our Court turned its attention to the duty every citizen has to use his property so as not to wrong or

injure others. It quotes from other decisions concerning this duty as follows:

> "Thus the ... [state] may properly regulate the use of property where uncontrolled use would be harmful to the public interest; and ...[this] regulation even though it prohibits the a beneficial use, will not necessarily be deemed a taking in the constitution sense. "See Brecciaroli v. Connecticut Commissioner of Environmental Protection, 362 A.2d 948, 951 (Connecticut. 1975); also see Goldblatt v. Hempstead, 369 U.S. 590, 825. CT. 987, 8 L.Ed. 130 (1962); Richards v. City of Columbia, 227 S.C. 538, 88 S.E. 2d 683 (1955).

Our Court then looked at the level of harm uncontrolled use of wetlands would have on the public welfare and determined that the Carter's permit request to fill wetlands was properly denied. The Court cited the findings of the Coastal Management Act which expressed the Legislature' s concern over declining natural resources in the coastal zone. (See Section 48-39-20(B)).

After looking at the value of the resource sought to be protected by the police power, the Court finally turned its attention to the value of the private landowner's interest in the wetland if it were filled. While the Court recognized the filled wetland would have a greater value to the Carter's, the court held:

> An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of other." Just v. Marinette County, 201 N.W. 2d 761, 768 (Wisc. 1972); Graham v. Estuary Properties,Inc., 399 S.E. 2d 1374, 1382 (Fla. 1981).

At issue in this case is whether Council's decision to limit the movement forward of existing seawalls on four lots at North Myrtle Beach, which would be 18 1/2 feet across two lots and twenty-four and 3/4 feet on the other two lots,

amounts to an unduly restrictive regulation.

Clearly, the facts of this case do not cross the threshold requiring compensation or amount to an unconstitutional taking. This is Carter on the beach. Here, as in Carter, the applicants would "change the essential natural character of [his] land so as to use it for a purpose for which it is unsuited in its natural state and which injures the rights of others."

Not only is this case similar to Carter, it has elements which militate more strongly that the regulation is a reasonable exercise of police power. Unlike Carter where the court protected rarely used marshlands, here we have dry sand beach which has customarily been used by the public time immemorial. Further, the resource here has significant economic consequences in that coastal tourism is

largely built in the continued existence of the dry sand beach. Thus, the resource "critical area" being protected more immediately and directly affects the public welfare than the resource (marshland) protected in Carter.

In addition to the conclusions reached in Carter, the United States Supreme Court recently in the case of Keystone Bituminous Coal Association v. DeBenedictis, U.S. [480 U.S. 221, 107 S.Ct. 1232, 94 L.Ed. 2d 472 14 (1987)], confirmed a consistent theme in taking cases presented to it by recognizing that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." Also see Mugler v. Kansas, 123 U.S., at 665; Beer Company v. Massachusetts, 97 U.S. 25, 32 (1878). When the use is deemed injurious to other

or amounts to a nuisance the courts generally hesitate to find a taking where the state merely restrains such private uses. See Takings, Private Property and Public Rights, 81 Yale L.J. 149, 155-161 (1971).

Here, the private use of dry sand beach is inconsistent with the common good because it negatively impacts a "critical" resource. This proposed project would eliminate public access to existing beach, potentially speed up erosion and ultimately impact the economy of the state. The proposed project as well has the potential of eventually impacting public trust lands by reducing the beach face and eliminating usable dry sand beach above and below mean high water. This would fall into the realm of nuisance.

In addition to the foregoing and in further support of the staff's decision,

the Council takes the position that the general public has a vested interest in the dry-sand beach up to the bulkhead line based upon the long usage of the dry-sand beach of the Grand Strand, the long acquiescence of the land owners to this use and the peculiar nature and value of the dry-sand beach. This position is supported by long recognized legal theories which when read solely and in combination, afford public rights in private lands and thus wholly defeat any argument of taking". There can be no taking because the permit denial is consistent with the vested public rights.

Courts across this country have recognized that dry-sand recreational beaches are impressed with the public's right to use and enjoy this resource. Recognizing the social and economic consequences of preservation of the dry-

sand beach, judges have employed many legal theories including prescriptive rights (see Seaway Company v. Attorney General, 375 S.W.2d 923, 937, (Tex. Civ. App. 1964)], implied dedication [see Gion v. City of Santa Cruz, 2 Cal. 3d 21, 465 P.2d 50 (1970), custom and usage (State ex rel. Thornton v. Hay, 254 Ore. 584. 462 P.2d 671 (1969), and the Public Trust Doctrine (Burrough of Neptune City v. Burrough of Avon by the Sea), 61 N.J. 296, 294, A.2d 47 (1972).

The legal theories differ in many aspects, but they all have one thing in common. Each theory is premised on the principle that the public, through its long and continued use of a dry sand beach, can acquire rights superior to the rights of the owner of the beach. The Council asserts that the public has for generations used the Grand Strand for

various forms of recreation and other uses and that this use has extended to some landward obstruction such as a dune, vegetation line or manmade device, these being the natural limits of public use. This is true of the site in question.

Several Courts have successfully applied the doctrine of custom and usage to fact situations similar to the one at hand. The Oregon Court in Thornton v. Hay determined that the public had acquired rights in the dry sand beach over and against private property rights through long usage. There the state sought to prevent the defendant landowners from enclosing dry sand beach within their oceanfront property lines.

Applying the tests of custom to the facts at hand, it is certain that permit was correctly denied.

1. The public has used the Grand Strand beaches for general recreation for generations. The use has generally been exercised to the dune or vegetation line. In this case, the public has regularly used the area of this lot up to the appellants' bulkhead.

2. The recreational use of the Grand Strand area is uninterrupted. In this instance the local municipality actually regulates certain uses on the dry sand beach.

3. The use has been free and without dispute.

4. Recreational use of the beach is reasonable and a common use of the beach. In fact, the beach is almost exclusively characterized by one use, recreational in nature.

5. The beach is suitable to the use.

6. The use has not been left to the landowners but dictated by custom.

7. This is not repugnant to the law and in fact is supported by various acts of the Legislature.

Support for the application of the doctrine of custom to the dry-sand beach of the Grand Strand can be found in the case law of South Carolina. Our court has

recognized that the public can acquire rights in private land through long use. [See Darlington v. Perkins, 239 S.E. 2d 69 (1977] We hold that under the doctrine of a custom and usage, the public has acquired a vested right to use the dry sand beach in the Grand Strand area and at this site particular.

Another equally compelling ground exists or denying this permit - the public trust doctrine. Our court has recognized that the public inherently has certain rights in private lands which are protected over and against the owner's unbridled use of his property. [Cape Romain Land and Improvement Company v. Georgia-Carolina Canning Company, 148 S.C. 428, 128 S.E. 434 (1928)]. The protection derived under Cape Romain comes in the form of the public trust doctrine which holds that tidelands are held in trust for

the people because they are so intrinsically important to society that private ownership of tidelands is qualified by use consistent with public interest. (See generally Sax, The Public Trust Doctrine and Natural Resource Law; Effective Judicial Intervention, 68 Michigan law review 473, 485 - 91(1970); and Wyche, Tidelands and the Public Trust: An Application for South Carolina, 7 Ecology L. Q. 137, 138-139 (1978).

While the public trust doctrine provides support for the use of the doctrine of custom to protect the valuable dry-sand beach resource for public recreational uses, the doctrine itself should be applied in support of the protection of the long held public use of the dry sand beach.

Our court has recognized that the public trust doctrine requires that lands

below mean nigh water in South Carolina are held in trust for public purposes. [(Cape Romain Land and Improvement Company v. Georgia Carolina Canning Company, 148 S.C. 428, 146 S.E. 434 (1928). (Also see Wyche, page 113.)] To date, our Court has not had the opportunity to discuss all the purposes (aside from navigation and fishing) which may be protected under the doctrine or if it can be applied above mean high water.

It is the Council's position that the public trust doctrine should be expanded to include public recreational uses to include the dry sand beach bordering the Atlantic Ocean above the mean high water mark. Given the unique geomorphic characteristics of the dry sand beach, its public character and economic significance to the state, expansion of the doctrine in this area is logical and appropriate.

First, significant public uses are at stake. The crisis which resulted in the development of the doctrine directly affected navigation and fishing which were the very basis of the economy of Elizabethan England. Today, however, swimming and other shore activities have become more important to the state than the traditional uses protected. It is clear that the economy of the state of South Carolina rests upon its tourism industry. (See Blue Ribbon Committee Report; State of South Carolina Coastal Management Final Environmental Impact Statement, 1-34.) Activities such as the one at hand threaten the use and enjoyment of the dry sand beach upon which the tourism industry is based. This position is supported by the state Attorney General who contended in 1970 that "the navigable waters, tidelands and submerged lands of

South Carolina are held in trust for and subject to public purposes and the rights of navigation, commerce, fishing, bathing, recreation or enjoyment in other public and useful purposes." (Op. South Carolina Attorney General, November 9, 1970.) In addition, the South Carolina Supreme Court of the state expanded the definition of navigable waters by determining the meaning of valuable floatage to include recreational use by the general public. (State vs. S.C. Coastal Council and C. E. Graham Reeves, et al., ____, S.C. ___, 346 S.E. 2d 716, S.C. 1986.)

In order for the public to fully enjoy the dry sand beach in this state, the public trust doctrine should be extended to include bathing swimming and other shore activities in recognition that they serve the general welfare and are as significant if not more significant than

fishing and navigation. Other states have embraced recreational use as a right guaranteed by the public trust doctrine. [Burrough of Neptune City v. Burrough of Avon-by-the-Sea], 61 N.J. 296, 303, 294 A.2d 47 (1972); Matthews v. Bayhead IMP Association, 95 N.J. 306, 471 A.2d 355 (N.J. 1984)]

> The enjoyment of this privilege [bathing in salt waters) of thus using the ocean and foreshore for ages without dispute should prove sufficient to establish it as an American common law right, similar to that of fishing in the sea, even if this right had not dome down to us as a part of English Common law, which it undoubtedly has. (White v. Hughes, 139 Fla. 5459, 190 So. 446, 449 (1939).

The Avon case is the leading case in this country recognizing that the public's rights in the dry sand and foreshore areas have been extended to protect "recreational uses including bathing, swimming and other shore activities." (61

N.J. at 309, 294 A.2d 47.) Adoption of the New Jersey rule by extension of the public trust doctrine to include the protection of recreational uses would do no injury to our case law, but instead would recognize the historical and continued actual use of the beaches of this state. Expansion of the doctrine to include these uses would not open the door to other areas because the beach is unique in character from a geographical, geomorphic and public use standpoint. Finally, if the public beaches are not held in trust, then no one has told public because they use it from its landward obstruction to the water (from either the vegetation line, dune line or first man-made structure).

Aside from the expansion of the public trust doctrine to include recreational use as a protected right of the public, the doctrine as well should be expanded beyond

the mean high water mark to include the dry-sand beach area up to the first impediment to use. As recognized in the Matthews case, this state should recognize that "enjoyment of rights in foreshore is inseparable from the use of dry sand beaches." inseparable from the use of dry sand beaches." (Matthews, at page 363; also see Lusardi v. Curtis Point Property Owners Association, 86 N.J. 217, 228, 430 A.2d 881 (1981). As pointed out by the New Jersey Court, "to say that the public trust doctrine entitles the public to swim in the ocean and use the foreshore in connection there with without assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate the rights of the public trust doctrine." Matthews, 364. In addition, the public follows the movement of the tides below and above the mean high tide

mark in its pursuit of beach recreation. If the public has no right to use the beach above mean high tide, this would mean that the public's recreational use of the beach would be severely impacted, and in fact, eliminated at any tide which has a runup above mean high.

Most importantly, however, is the fact that mean high tide is a meaningless measure upon the ever dynamic beach/dune system along the ocean. In many instances, the mean high tide mark will vary as much as 100 feet during a given year because of the process of erosion and accretion of the beach. Thus, the public trust doctrine would apply in its normal sense subject to the daily location of the mean high tide mark. This makes meaningless any reliance upon the mean high tide mark for application of the doctrine.

The foreshore and dry sand recreational beach are clearly one dynamic entity, incapable of division by any legal theory. If, the state is to protect the historical use of the beach in a realistic manner, the public trust doctrine should be expanded to include all components of the beach and its use. As stated by the New Jersey Court in Matthews, "Recognizing the increasing demand for our state's beaches and the dynamic nature of the public trust doctrine, we find that the public must be given both access to and use of privately owned dry sand beaches as reasonably necessary and the public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on a dry sand beach" (page 365-366).

Application of this doctrine would mean then that the private landowner could not use his property in a manner which would

be inconsistent with public recreational use. In the case at hand, however, the property owner seeks to remove from the publicly used lands a portion of dry sand beach approximately 4,000 square feet in size. While this may be deemed insignificant on a single lot in the Grand Strand area, the same request of similarly situated property owners could significantly reduce the amount of dry sand beach resource available to the public. This would come at a time when the use is dramatically increasing and thus, could have a cumulative impact on the state resource in a significant magnitude.

It is thus clear that an imperative of uses demands a more realistic expansion of the public trust doctrine to include dry sand beaches as an integral part of the lands protected by government for the

public good. The Coastal Management Act represents an embodiment of the public trust doctrine as it relates to preservation of public rights in wetlands. The application of the doctrine to this matter would bolster the agency' s strong charge to protect public rights with which the Act is concerned. These specific concerns include the fact that:

> Important ecological, cultural, natural, geological and scenic characteristics, industrial, economic and historic values in the coastal zone are being irretrievably damaged or lost by ill-planned development that now threatens these values, [48-39-30(E)], and that there is a "decreasing open space for public use and shoreline erosion" [Section 48-39-20(B)].

The dry-sand beach in this case is deemed critical area because of its significance to the public weal and the impact that development has had upon this natural resource. The application of the public trust doctrine to the permit

application at hand would significantly aid the South Carolina Coastal Council in its efforts to continue to wisely manage a diminishing resource.

CONCLUSION

Based upon (1) the factual findings, applicable provisions of the Coastal Zone Management Act of 1977 and the policies, rules and regulations promulgated thereunder, and (2) applicable law, the Council concludes that the permit application was appropriately denied.

By a vote of 15 to 0 the staff's recommendation is upheld.

AND IT IS SO ORDERED.

THE SUPREME COURT OF SOUTH CAROLINA

CLYDE N. DAVIS, JR.
CLERK
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, SC 29211
PHONE NO. 734-1080

April 17, 1991

Fred B. Newby, Esquire
P. O. Box 719
Myrtle Beach, S. C. 29578

Re: Robert and Alice Beard v. S.C. Coastal Council, et al.

Dear Mr. Newby:

The Court has refused your Petition for Rehearing in the above case in the following order.

"Petition for Rehearing denied.

s/George T. Gregory, Jr. C.J.

s/A. Lee Chandler A.J.

s/Ernest A. Finney, Jr. A.J.

s/Jean H. Toal A.J.

"Petition for Rehearing granted.

s/David W. Harwell A.J.

April 17, 1991."

The remittitur in this matter is today being forwarded to the Clerk of Court for Horry County.

Sincerely yours,

CLERK

CND,Jr./dmh

cc: C. C. Harness, III, Esquire
James F. Chandler, Jr., Esquire
Dwight F. Drake, Esquire

APPENDIX E

CHAPTER 39

Coastal Tidelands and Wetlands

Sec.

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48-39-150. Approval or denial of permits; appeal to Council.
48-39-160. Violations; jurisdiction of courts.
48-39-170. Penalties.
48-39-180. Judicial review of permit determinations.
48-39-190. Lands not affected by chapter.
48-39-200. Restriction of Council's regulatory authority.
48-39-210. Council only state agency authorized to permit or deny alternations or utilizations within critical areas.
48-39-220. Legal action to determine interest in tidelands.

§ 48-39-10. Definitions.

As used in this chapter:

(A) "Applicant" means any person who filed an application for a permit under the provisions of this chapter.

(B) "Coastal zone" means all coastal waters and submerged lands seaward to the State's jurisdictional limits and all lands and waters in the counties of the State which

contain any one or more of the critical areas. These counties are Beaufort, Berkeley, Charleston, Colleton, Dorchester, Horry, Jasper and Georgetown.

(C) "Council" means the South Carolina Coastal Council.

(D) "CCPS" means Coastal Council Permitting Staff.

(E) "Saline waters" means those waters which contain a measurable quantity of sea water, at least one part chloride ion per thousand.

(F) "Coastal waters" means the navigable waters of the United States subject to the ebb and flood of the tide and which are saline waters, shoreward to their mean high-water mark. Provided, however, that the Council may

designate boundaries which approximate the mean extent of saline waters until such time as the mean extent of saline waters can be determined scientifically.

(G) "Tidelands" means all areas which are at or below mean high tide and coastal wetlands, mudflats, and similar areas that are contiguous or adjacent to coastal waters and are an integral part of the estuarine systems involved. Coastal wetlands include marshes, mudflats, and shallows and means those areas periodically inundated by saline waters whether or not the saline waters reach the area naturally or through artificial water courses and those areas that are normally characterized by the prevalence of saline water

vegetation capable of growth and reproduction. Provided, however, nothing in this definition shall apply to wetland areas that are not an integral part of an estuarine system. Further, until such time as the exact geographic extent of this definition can be scientifically determined, the Council shall have the authority to designate its approximate geographic extent.

(H) "Beaches" means those lands subject to periodic inundation by tidal and wave action so that no nonlittoral vegetation is established.

(I) "Primary ocean front sand dunes" means those duties which constitute the front row of dunes adjacent to the Atlantic Ocean.

(J) "Critical area" means any of the following: (1) coastal waters, (2) tidelands, (3) beaches and (4) primary ocean front sand dunes.

(K) "Person" means any individual, organization, association, partnership, business trust, estate trust, corporation, public or municipal corporation, county, local government unit, public or private authority and shall include the State of South Carolina, its political subdivisions and all its departments, boards, bureaus or other agencies, unless specifically exempted by this chapter.

(L) "Estuarine sanctuary" means a research area designated as an

estuarine sanctuary by the Secretary of Commerce.

(M) "Marine sanctuary" means any water and wetland areas designated as a marine sanctuary by the Secretary of Commerce.

(N) "Minor development activities" means the construction, maintenance, repair, or alteration of any private piers or erosion control structure, the construction of which does not involve dredge activities.

(O) "Dredging" means the removal or displacement by any means of soil, sand, gravel, shells or other material, whether of intrinsic value or not, from any critical area.

(P) "Filling" means either the displacement of saline waters by

the depositing into critical areas of soil, sand, gravel, shells or other material or the artificial alteration of water levels or water currents by physical structure, drainage ditches or otherwise.

(Q) "Submerged lands" means those river, creek and ocean bottoms lying below mean low-water mark.

(R) "Oil" means crude petroleum oil and all other hydrocarbons, regardless of specific gravity, that are produced in liquid form by ordinary production methods, but does not include liquid hydrocarbons that were originally in a gaseous phase in the reservoir.

(S) "Gas" means all natural gas and all other fluid hydrocarbons not

hereinabove defined as oil, including condensate because it originally was in a gaseous phase in the reservoir.

(T) "Fuel" means gas and oil.

(U) "Emergency" means any unusual incident resulting from natural or unnatural causes which endanger the health, safety or resources of the residents of the State, including damages or erosion to any beach or shore resulting from a hurricane, storm or other such violent disturbance.

§ 48-39-20. Legislative declaration of findings.

The General Assembly finds that:

(A) The coastal zone is rich in a variety of natural, commercial, recreational and industrial

resources of immediate and potential value to the present and future well-being of the State.

(B) The increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development, including requirements for industry, commerce, residential development, recreation, extraction of mineral resources and fossil fuels, transportation and navigation, waste disposal and harvesting of fish, shellfish and other living marine resources have resulted in the decline or loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological

systems, decreasing open space for public use and shoreline erosion.

(C) A variety of federal agencies presently operate land use controls and permit systems in the coastal zone. South Carolina can only remain control of the regulation of its critical areas by developing its own management program. The key to accomplishing this is to encourage the state and local governments to exercise their full authority over the lands and waters in the coastal zone.

(D) The coastal zone and the fish, shellfish, other living marine resources and wildlife therein, may be ecologically fragile and consequently extremely vulnerable

to destruction by man's alterations.

(E) Important ecological, cultural, natural, geological and scenic characteristics, industrial, economic and historical values in the coastal zone are being irretrievably damaged or lost by ill-planned development that threatens to destroy these values.

(F) In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone while balancing economic interests, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate.

§ 48-39-30. Legislative declaration of state policy.

(A) The General Assembly declares the basic state policy in the implementation of this chapter is to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State.

(B) Specific state policies to be followed in the implementation of this chapter are:

(1) To promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal

planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;

(2) To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations;

(3) To formulate a comprehensive tidelands protection program;

(4) To formulate a comprehensive beach erosion and protection policy including the

protection of necessary sand dunes.

(5) To encourage and assist state agencies, counties, municipalities and regional agencies to exercise their responsibilities and owners in the coastal zone through the development and implementation of comprehensive programs to achieve wise use of coastal resources giving full consideration to ecological, cultural and historic values as well as to the needs for economic and social development and resources conservation.

(C) In the implementation of the chapter, no government agency shall adopt

a rule or regulation or issue any order that is unduly restrictive so as to constitute a taking of property without the payment of just compensation in violation of the Constitution of this State or of the United States.

(D) Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits. As such, the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter.

(E) It shall be the policy of the State to coordinate the coastal planning and management program effort with other coastal states and organizations of coastal states.

§ 48-39-40. Creation of South Carolina Coastal Council; members; terms.

(A) There is hereby created the South Carolina Coastal Council which shall consist of eighteen members as follows: Eight members, one from each coastal zone county, to be appointed by the local county governing body; six members, one from each of the congressional districts of the State, to be elected by a majority vote of the members of the House of Representatives and the Senate representing the counties in such district, each such House or Senate member to have one vote; and the following legislative members who shall serve ex officio: Two state Senators, one to be appointed by the President of the State and one to be elected by the Senate Fish, Game and Forestry Committee; and two

members of the House of Representatives to be appointed by the Speaker of the House. The Council shall elect a chairman, vice-chairman and such other officers as it deems necessary.

(B) Terms of legislative members shall be coterminous with their terms as members of the General Assembly. Terms of all non-legislative members shall be for four years and until successors are appointed and qualify, except that of those initially appointed three of the members appointed by county governing bodies and two members from congressional districts shall serve terms of two years only as determined by lot at the first meeting of the Council. Vacancies shall be filled in the original manner of selection for the unexpired term.

§ 48-39-50. Powers and Duties of Council.

The Council shall have the following powers and duties:

(A) To employ the CCPS consisting of, but not limited to, the following professional members: An administrator and other staff members to include those having expertise in biology, civil and hydrological engineering, planning, environmental engineering and environmental law.

(B) To apply for, accept and expend financial assistance from public and private sources in support of activities undertaken pursuant to this chapter and the Federal Coastal Zone Management Act of 1972.

(C) To undertake the related programs necessary to develop and recommend to the Governor and the General

Assembly a comprehensive program designed to promote the policies set forth in this chapter.

(D) To hold public hearings and related community forums and afford participation in the development of management programs to all interested citizens, local governments and relevant state and federal agencies, port authorities and other interested parties.

(E) To promulgate necessary rules and regulations to carry out the provisions of this chapter.

(F) To administer the provisions of this chapter and all rules, regulations and orders promulgated under it.

(G) To examine, modify, approve or deny applications for permits for

activities covered by the provisions of this chapter.

(H) To revoke and suspend permits of persons who fail or refuse to carry out or comply with the terms and conditions of the permit.

(I) To enforce the provisions of this chapter and all rules and regulations promulgated by the Council and institute or cause to be instituted in courts of competent jurisdiction of legal proceedings to compel compliance with the provisions of this chapter.

(J) To management estuarine and marine sanctuaries and regulate all activities therein, including the regulation of the use of the coastal waters located within the boundary of such sanctuary.

(K) To establish, control and administer pipeline corridors and locations of pipelines used for the transportation of any fuel on or in the critical areas.

(L) To direct and coordinate the beach and coastal shore erosion control activities among the various state and local governments.

(M) To implement the state policies declared by this chapter.

(N) To encourage and promote the cooperation and assistance of state agencies, coastal regional councils of government, local governments, federal agencies and other interested parties.

(O) To exercise all incidental powers necessary to carry out the provisions of this chapter.

(P) To coordinate the efforts of all public and private agencies and organizations engaged in the making of tidal surveys of the coastal zone of this State with the object of avoiding unnecessary duplication and overlapping.

(Q) To serve as a coordinating state agency for any program of tidal surveying conducted by the federal government.

(R) To develop uniform specifications and regulations for tidal surveying.

(S) To monitor, in coordination with the South Carolina Department of Wildlife and Marine Resources, the waters of the State for oil spills. If such Department observes an oil spill in such waters it shall immediately report

such spill to the South Carolina Department of Health and Environmental Control, the United States Coast Guard and Environmental Protection Agency. This in no way negates the responsibility of the spiller to report a spill.

(T) To direct, in coordination with the South Carolina Department of Health and Environmental Control as the designated state agency to provide liaison to the regional response team, pursuant to Section 1510.23 of the National Contingency Plan, state supervised removal operations of oil discharged into the waters within the territorial jurisdiction of this State and entering such waters after being discharged

elsewhere within the State, and to seek reimbursement from the National Contingency Fund for removal operations cost expended by it and all other agencies and political subdivisions including county, municipal and regional governmental entities in removing such oil as provided for in Section 311(C)(2) of the Federal Water Pollution Control Act.

(U) To act as advocate, where the Council deems such action is appropriate, on behalf of any person who is granted a permit for a specific development by the Council but is denied a permit by a federal agency for the same specific development.

(V) To delegate any of its powers and duties to the CCPS.

§ 48-39-60. Personnel provided by Wildlife and Marine Resources Department.

When requested by the Council, the Wildlife and Marine Resources Department shall provide additional staff for the Council, including any additional conservation officers, necessary to administer the provisions of this chapter and for which funds are available.

§ 48-39-70. Cooperation of other agencies and commissions; administration of oaths; subpoenas.

(A) All other state and local agencies and commissions shall cooperate with the Council in the administration of enforcement of this chapter. All agencies currently exercising regulatory authority in the coastal zone shall administer such authority in accordance with the

provisions of this chapter and rules and regulations promulgated thereunder.

(B) The Council in the discharge of its duties may administer oaths and affirmations, take depositions and issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda and other records deemed necessary in connection with the work of the Council. The only exception shall be, that information considered proprietary by the applicant. If in the opinion of the Council a proper decision cannot be rendered without the submission of such proprietary information, the Council shall be empowered to execute an agreement on confidentiality with the applicant and such information shall not be made a part of the public record of current or future proceedings.

(C) In case the contumacy by any person or refusal to obey a subpoena issued to any person, any circuit court of this State or circuit judge thereof within the jurisdiction of which such person guilty of contumacy or refusal to obey is found, resides or transacts business, upon application by the Council, may issue to such person an order requiring him to appear before the Council to produce evidence if so ordered or give testimony touching the matter under investigation. Any failure to obey an order of the court may be punished as a contempt hereof. Subpoenas shall be issued in the name of the Council and signed by the Council chairman. Subpoenas shall be issued to such persons as the Council may designate.

§ 48-39-80. Development of coastal management program.

The council shall develop a comprehensive coastal management program, and thereafter have the responsibility for enforcing and administering the program in accordance with the provisions of this chapter and any rules and regulations promulgated under this chapter. In developing the program the Council shall:

(A) Provide a regulatory system which the Council shall use in providing for the orderly and beneficial use of the critical areas.

(B) In devising the management program the Council shall consider all lands and waters in the coastal zone for planning purposes. In addition, the Council shall:

(1) Identify present land uses and coastal resources.

(2) Evaluate these resources in terms of their quality,

quantity and capability for use both now and in the future.

(3) Determine the present and potential uses and the present and potential conflicts in uses of each coastal resource.

(4) Inventory and designate areas of critical state concern within the coastal zone, such as port areas, significant natural and environmental, industrial and recreational areas.

(5) Establish broad guidelines on priority of uses in critical areas.

(6) Provide for adequate consideration of the local, regional, state and national

interest involved in the siting of facilities for the development, generation, transmission and distribution of energy, adequate transportation facilities and other public services necessary to meet requirements which are other than local in nature.

(7) Provide for consideration of whether a proposed activity of an applicant for a federal license or permit complies with the State's coastal zone program and for the issuance of notice to any concerned federal agency as to whether the State concurs with or objects to the proposed activity.

(8) Provide for a review process of the management plan and alterations thereof that involves local, regional, state and federal agencies.

(9) Conduct other studies and surveys as may be required, including the beach erosion control policy as outlined in this chapter.

(10) Devise a method by which the permitting process shall be streamlined and simplified so as to avoid duplication.

(11) Develop a system whereby the Council shall have the authority to review all state and federal permit applications in the coastal zone, and to certify that

these do not contravene the management plan.

(C) Provide for a review process of the management program and alterations that involve interested citizens as well as local, regional, state and federal agencies.

(D) Consider in conjunction with the Department of Health and Environmental Control the planning and review of existing water quality standards and classifications in the coastal zone.

(E) Provide consideration for nature-related uses of critical areas, such as aquaculture, mariculture, waterfowl and wading bird management, game and nongame

habitat protection projects and endangered flora and fauna.

§ 48-39-90. Public hearings on management plan.

(A) The Council, on thirty days' notice, shall hold statewide public hearings on the proposed coastal zone management plan to obtain the views of all interested parties, particularly all interested citizens, agencies, local governments, regional organizations and port authorities.

(B) All Council documents associated with such hearings shall be conveniently available to the public for review and study at least thirty days prior to a hearing. A report of each hearing shall be prepared and made available to the public within forty-five days of such hearing.

(C) After sufficient hearings and upon consideration of the views of interested parties the Council shall propose a final management plan for the coastal zone to the Governor and the General Assembly.

(D) Upon review and approval of the proposed management plan by the Governor and General Assembly, the proposed plan shall become the final management plan for the State's coastal zone.

(E) Any change in or amendment to the final management plan shall be implemented by following the procedures established in subsections (A), (B), (C) and (D) of this section and upon the review and approval of the Governor and the General Assembly.

§ 48-39-100. Plan developed in cooperation with local governments.

(A) The management program specified in § 48-39-90 shall be developed in

complete cooperation with affected local governments in the coastal zone. This cooperation shall include, but not be limited to:

(1) Involvement of local governments or their designees in the management program.

(2) Provision of technical assistance and grants to aid local governments in carrying out their responsibilities under this chapter.

(3) Dissemination of improved informational data on coastal resources to local and regional governmental units.

(4) Recommendations to local and regional governmental units as to needed modifications or alterations in local

ordinances that become apparent as a result of the generation of improved and more comprehensive information.

(B) Any city or county that is currently enforcing a zoning ordinance, subdivision regulation or building code, a part of which applies to critical areas, shall submit the elements of such ordinances and regulations applying to critical areas to the Council for review. The Council shall evaluate such ordinances and plans to determine that they meet the provisions of this chapter and rules and regulations promulgated hereunder. Upon determination and approval by the Council, such ordinances and regulations shall be adopted by the Council, followed by the Council in meeting its permit responsibilities under this chapter and

integrated into the Council's Coastal Management Program. Any change or modification in the elements of approved zoning ordinances, subdivision regulations or building codes applying to critical areas shall be disapproved by the Council if it is not in compliance with the provisions of this chapter and rules and regulations promulgated hereunder.

(C) Any city or county that is not currently enforcing ordinances or regulations on the critical areas within its jurisdiction at its option may elect to develop a management program for such critical areas by notifying the Council of its intent within one hundred and eighty days following the 24th day of May, 1977. Such proposed ordinances and regulations applying to critical areas shall be subject to the process specified in § 48-39-100(B).

(D) Any county or city may delegate some or all of its responsibilities in developing a costal management program for critical areas under its jurisdiction to the regional council of government of which it is a part, provided the county or city has notified the Council in writing at least thirty days prior to the date on which such action is to be taken.

§ 48-39-110. Submission of plan by State Ports Authority.

The South Carolina State Ports Authority shall prepare and submit to the Council a management plan for port and harbor facilities and navigation channels. Upon approval by the Council of such management plan it shall become part of the comprehensive coastal management program developed by the Council. The South Carolina State Ports Authority shall

include in the management plan a designation of the geographical area appropriate for use by public and private port and harbor facilities and military and naval facilities and submit this to the Council for approval.

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The South Carolina Ports Authority and the South Carolina Public Service Authority do not come within the definition of State agency as that term is used by the General Assembly in § 24 of the General Appropriations Act 1978-1979. 1978 Op Att'y Gen, No 78-210, p 243.

§ 48-39-120. Development of beach erosion control policy; issuance of permits for erosion control structures; removal of structures; limitation on development of property.

(A) The Council shall develop and institute a comprehensive beach erosion control policy that identifies critical erosion areas, evaluates the benefits and costs of erosion control structures funded by the State, considers the dynamic littoral and offshore drift systems, and dunes and like items.

(B) The Council for and on behalf of the State may issue permits for erosion control structures following the provisions of this section and §§ 48-39-140 and 48-39-150, on or upon the tidelands and coastal waters of this State as it may deem most advantageous. Provided, however, that no property rebuilt or accreted as a result of natural forces or as a result of a permitted structure shall exceed the original property line or boundary. Provided, further, that no person or governmental

agency may develop ocean front property accreted by natural forces or as the result of permitted or nonpermitted structures beyond the mean high water mark as it existed at the time the ocean front property was initially developed or subdivided, and such property shall remain the property of the State held in trust for the people of the State.

(C) The Council shall have the authority to remove all erosion control structures which have an adverse effect on the public interest.

(D) The Council is authorized for and in behalf of the State to accept such federal monies for beach or shore erosion control in areas to which the public has full and complete access as are available and to sign all necessary agreements and to do and perform all necessary acts in

connection therewith to effectuate the intent and purposes of such federal aid.

(E) If a beach or share erosion emergency is declared by the Council, the State, acting through the Council, may spend whatever state funds are available to alleviate beach or share erosion in areas to which the public has full and complete access, including any funds which may be specifically set aside for such purposes.

(F) The Council, for and on behalf of the State, may issue permits not otherwise provided by state law, for erosion and water drainage structure in or upon the tidelands, submerged lands and waters of this State below the mean high-water mark as it may deem most advantageous to the State for the purpose of promoting the public health, safety and welfare, the protection of public and private property

from beach and shore destruction and the continued use of tidelands, submerged lands and waters for public purposes.

§ 48-39-130. Permits required to utilize critical areas.

(A) Ninety days after July 1, 1977, no person shall utilize a critical area for a use other than the use the critical area was devoted to on such date unless he has first obtained a permit from the Council.

(B) Within sixty days of July 1, 1977, the Council shall publish and make available the interim rules and regulations it will follow in evaluating permit applications. These interim rules and regulations shall be used in evaluating and granting or denying all permit applications until such time as the final rules and regulations are adopted in accordance with this section and Chapter

23 of Title 1. Within one hundred and twenty days of July 1, 1977 the Council shall publish and make available to local and regional governments and interested citizens for review and comment a draft of the final rules and regulations it will follow in evaluating permit applications. Sixty days after making such guidelines available the Council shall hold a public hearing affording all interested persons an opportunity to comment on such guidelines. Following the public hearing the Council shall in ninety days publish final rules and regulations. Provided, however, the interim rules and regulations shall not be subject to the provisions of Chapter 23 of Title 1.

(C) Ninety days after July 1, 1977 no person shall fill, remove, dredge, drain or erect any structure on or in any way alter any critical area without first

obtaining a permit from the Council. Provided, however, that a person who has legally commenced a use such as those evidenced by a state permit, as issued by the Budget and Control Board, or a project loan approved by the rural electrification administration or a local building permit or has received a United States Corps of Engineers or Coast Guard permit, where applicable, may continue such use without obtaining a permit. Any person may request the Council to review any project or activity to determine if he is exempt under this section from the provisions of this chapter. The Council shall make such determinations within forty-five days from the receipt of any such request.

(D) It shall not be necessary to apply for a permit for the following activities:

(1) The accomplishment of emergency orders of any duly

appointed official of a county, municipality or of the State, acting to protect the public health and safety, upon notification to the Council.

(2) Hunting, erecting duckblinds, fishing, shellfishing and trapping when and where otherwise permitted by law; the conservation, repletion and research activities of state agencies and educational institutions or boating or other recreation provided that such activities cause no material harm to the flora, fauna, physical or aesthetic resources of the area.

(3) The discharge of treated effluent as permitted by law; provided, however, that the Council shall have the authority to review and comment on all proposed permits that would affect critical areas.

(4) Dredge and fill performed by the United States Corps of Engineers for the maintenance of the harbor channels and the collection and disposal of the materials so dredged; provided, however, that the Council shall have authority to review and certify all such proposed dredge and fill activities.

(5) Construction of walkways over sand dunes in accordance with

regulations promulgated by the Council.

(6) Emergency repairs to any existing bank, dike or structure which has been erected in accordance with federal and state laws, including fishing piers which are provided for by general law or acts passed by the General Assembly of South Carolina; provided, however, that notice shall be given to the Council within seventy-two hours from the onset of needed repairs.

(7) Maintenance and repair of drainage and sewer facilities constructed in accordance with federal or state laws and normal maintenance and

repair of any utility or railroad.

(8) Normal maintenance or repair to any pier or walkway provided that such maintenance or repair not involve dredge or fill.

(9) Construction or maintenance of a major utility facility where the utility has obtained a certificate for such facility under "The Utility Facility Siting and Environmental Protection Act", Chapter 33 of Title 58 of the 1976 Code. Provided, however, that the South Carolina Public Service Commission shall make the Council a party to certification proceedings for

utility facilities within the coastal zone.

§ 48-39-140. Submission of development plans; application for permits.

(A) Any person who wishes may submit development plans to the Council for preliminary review. If a permit is necessary, the Council will make every effort to assist the applicant in expediting the permit application.

(B) Each application for a permit shall be filed with the Council and shall include:

(1) Name and address of the applicant.

(2) A plan or drawing showing the applicant's proposal and the manner or method by which the proposal shall be accomplished.

(3) A plat of the area in which the proposed work will take place.

(4) A copy of the deed, lease or other instrument under which the applicant claims title, possession or permission from the owner of the property, to carry out the proposal.

(5) A list of all adjoining landowners and their addresses or a sworn affidavit that with due diligence such information is not ascertainable.

(C) The Council within thirty days of receipt of an application for a permit shall notify, in writing, interested agencies, all adjoining landowners, local government units in which the land is located and other interested persons of

the application and shall indicate the nature of the applicant's proposal. Public notice shall be given at least once by advertisement in state and local newspapers of general circulation in the area concerned. The Council may hold a public hearing on applications which have any effect on a critical area if it deems a hearing necessary. The public hearing shall be held in the county where the land is located and if in more than one county the Council shall determine in which county to holding the hearing or may hold hearings in both counties.

Provided, all interested agencies, all adjoining landowners, local government units and other interested persons shall have thirty days to file written comment to such application after receipt of any such notice by the Council.

§ 48-39-145. Application fee for permit to alter critical area; disposition of proceeds.

(A) The South Carolina Coastal Council may charge an administrative fee upon application for a permit for alteration of any critical area as defined in § 48-39-10. Applications for permits which are noncommercial/nonindustrial in nature and provide personal benefits that have no connection with a commercial/industrial enterprise shall be charged an administrative fee not to exceed fifty dollars. A reasonable fee, determined by the South Carolina Coastal Council, will be charged for permit applications when the planned or ultimate purpose of the activity is commercial or industrial in nature.

(B) Any fees collected under this

provision shall be forwarded to the State Treasurer for credit to the general fund.

§ 48-39-150. Approval or denial of permits; appeal to Council.

(A) In determining whether a permit application is approved or denied the Council shall base its determination on the individual merits of each application, the policies specified in §§ 48-39-20 and 48-39-30 and be guided by the following general considerations:

(1) The extent to which the activity requires a waterfront location or is economically enhanced by its proximity to the water.

(2) The extent to which the activity would harmfully obstruct the natural flow of navigable water. If the

proposed project is one or more of the State's harbors or in a waterway used for commercial navigation and shipping or in an area set aside for port development in an approved management plan, then a certificate from the South Carolina State Ports Authority declaring the proposed project or activity would not unreasonably interfere with commercial navigation and shipping must be obtained by the Council prior to issuing a permit.

(3) The extent to which the applicant's completed project would affect the production of fish, shrimp, oysters, crabs or clams or any marine

life or wildlife or other natural resources in a particular area including but not limited to water and oxygen supply.

(4) The extent to which the activity could cause erosion, shoaling of channels or creation of stagnant water.

(5) The extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal sources.

(6) The extent to which the development could affect the habitats for rare and endangered species of wildlife or irreplaceable

historic and archaeological sites of South Carolina's coastal zone.

(7) The extent of the economic benefit as compared with the benefits from preservation of an area in its unaltered state.

(8) The extent of any adverse environmental impact which cannot be avoided by reasonable safeguards.

(9) The extent to which all feasible safeguards are taken to avoid adverse environmental impact resulting from a project.

(10) The extent to which the proposed use could affect the value and enjoyment of adjacent owners.

(B) After considering the views of interested agencies, local governments and persons, and after evaluation of biological and economic considerations, if the Council finds that the application is not contrary to the policies specified in this chapter, it shall issue to the applicant a permit. The permit may be conditioned upon the applicant's amending the proposal to take whatever measures the Council feels are necessary to protect the public interest. At the request of twenty citizens or residents of the county or counties affected, the Council shall hold a public hearing on any application which has an effect on a critical area, prior to issuing a permit. Such public hearings shall be open to all citizens of the State. When applicable, joint public hearings will be held in conjunction with any such hearings required by the U.S.

Army Corps of Engineers. On any permit application pertaining to a specific development which has been approved by the Council, the Council may support the applicant with respect to any federal permit applications pertaining to the same specific development.

(C) The Council shall act upon an application for a permit within ninety days after the application is filed. Provided, however, that in the case of minor developments, as defined in § 48-39-10, the Council shall have the authority to approve such permits and shall act within thirty days. In the event a permit is denied the Council shall state the reasons for such denial and such reasons must be in accordance with the provisions of this chapter.

(D) Any applicant having a permit denied or any person adversely affected by

the granting of the permit has the right of direct appeal to the Council. Any applicant having a permit denied may challenge the validity of any or all reasons given for denial.

(E) Any permit may be revoked for noncompliance with or violation of its terms after written notice of intention to do so has bee given the holder and the holder given an opportunity to present an explanation to the Council.

(F) Work authorized by permits issued hereunder shall be completed within three years after the date of issuance of the permit. The time limit may be extended for good cause showing that due diligence toward completion of the work has been made as evidenced by significant work progress.

§ 48-39-160. Violations; jurisdictions of courts.

The circuit court of the county in which the affected critical area or any part thereof lies shall have jurisdiction to restrain a violation of this chapter at the suit of the Council, the Attorney General or any person adversely affected. In the event the affected critical area lies in more than one county, jurisdiction shall be in the circuit court of any county in which any part of the area lies. In the same action the circuit court having jurisdiction over the affected area may require such area to be restored to its original condition, if possible, and environmentally desirable. In the alternative, the Council may complete the restoration at the expense of the person altering the area in which case suit for recovery of the amount so expended may be

brought in any court having jurisdiction to restrain a violation. No bond shall be required as a condition of the granting of a temporary restraining order under this section, except that the court may in its discretion require that a reasonable bond be posted by any person requesting the court to restrain a violation of this chapter.

§ 48-39-170. Penalties.

(A) Any person violating any provision of this chapter shall be deemed guilty of a misdemeanor and upon conviction shall be punished by imprisonment of not more than six months or by a fine of not more than five thousand dollars, or both, for the first offense, and by imprisonment of not more than one year, or by a fine of not more than ten thousand dollars, or both, for each subsequent offense.

(B) Any violation of any provision of this chapter involving five yards square (225 square feet) or less of critical area may be treated as a minor violation, the penalty for which shall be a fine of not less than fifty dollars nor more than two hundred dollars. The conservation officers of the South Carolina Wildlife and Marine Resources Department may serve warrants under this provision and otherwise enforce this chapter. The magistrates of this State have jurisdiction over minor violations of this chapter. Each day of noncompliance with any order issued relative to a minor violation or noncompliance with any permit regulation, standard, or requirement relative to a minor violation shall constitute a separate offense; provided, however, that violations which involve the construction or repair of water control

structures shall not be considered minor violations regardless of the area involved.

(C) Any person who is determined to be in violation of any provision of this chapter by the Coastal Council shall be liable for, and may be assessed by the Council for, a civil penalty of not less than one hundred dollars nor more than one thousand dollars per day of violation. Whenever the Council determines that any person is in violation of any permit, regulation, standard, or requirement under this chapter, the Council may issue an order requiring such person to comply with such permit, regulation, standard, or requirement, including an order requiring restoration when deemed environmentally appropriate by the Council; in addition, the Council may bring a civil enforcement action under this section as well as

seeking an appropriate injunctive relief under § 48-39-160.

(D) All penalties assessed and collected pursuant to this section shall be deposited in the general fund of the State.

§ 48-39-180. Judicial review of permit determinations.

Any applicant whose permit application has been denied, revoked, suspended or approved subject to conditions of the Council, or any person adversely affected by the permit, may, within twenty days after receiving notice thereof, file petition in the circuit court having jurisdiction over the affected land for a review of the Council's action "de novo" or to determine whether the Council's action so restricts or otherwise affects the use of the property as to deprive the

owner of its existing practical use and is an unreasonable exercise of the State's police power because the action constitutes the equivalent of taking without compensation. If the court finds the action to be an unreasonable exercise of the police power it shall enter a finding that the action shall not apply to the land of the plaintiff, or in the alternative, that the Council shall pay reasonable compensation for the loss of use of the land. The use allowed by any permit issued under this chapter may, in the discretion of the court, be stayed pending decision on all appeals that may be taken. The circuit court may in its discretion require that a reasonable bond be posted by any person. It is specifically intended that any person whose permit application has been denied may have such permit issued by the circuit

court having jurisdiction if such person can prove the reasons given for denial to be invalid.

§ 48-39-190. Lands not affected by chapter.

Nothing in this chapter shall affect the status of the title of the State or any person to any land below the mean highwater mark. The State shall in no way be liable for any damages as a result of the erection of permitted work.

§ 48-39-200. Restriction of Council's regulatory authority.

Notwithstanding any other provisions of this chapter, the Council shall have no direct regulatory authority over any area outside the critical areas in the coastal zone.

§ 48-39-219. Council only state agency authorized to permit or deny alterations or utilizations within critical areas.

Ninety days after July 1, 1977, the Council shall be the only state agency with authority to permit or deny any alteration or utilization within the critical area except for the exemptions granted under § 48-39-130(D) and such application for a permit shall be acted upon within the time prescribed by this chapter.

§ 48-39-220. Legal action to determine interest in tidelands.

(A) Any person claiming an interest in tidelands which, for the purpose of this section, means all lands except beaches in the Coastal Zone between the mean high-water mark and the mean low-water mark of navigable waters without regard to the

degree of salinity of such waters, may institute an action against the State of South Carolina for the purpose of determining the existence of any right, title or interest of such person in and to such tidelands as against the State. Service of process shall be made upon the secretary of the State Budget and Control Board.

(B) Any party may demand a trial by jury in any such action by serving upon the other party(s) a demand therefor in writing at any time after the commencement of the action and not later than ten (10) days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

(C) Nothing contained in this chapter shall be construed to change the law of this State as it exists on July 1, 1977,

relative to the right, title, or interest in and to such tidelands, except as set forth in this section.

(D) The Attorney General shall immediately notify the Council upon receipt of any private suit made under this section, his response to that suit, and the final disposition of the suit. The Council will publish all such notifications in the state register.